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September 6, 2011

Calistoga City Council
c/o City Clerk
1232 Washington Street
Calistoga, California 94515

Delivery by mail and email to SSneddon@ci.calistoga.ca.us

RE: Agenda Item G.3. – Grape Sourcing Ordinance

Dear Mayor and Councilmembers:

I represent William and Jeffrey Bounsall who own property located at 414 Foothill Boulevard in the City of Calistoga. As noted in your Staff Report, the Bounsall family is pursuing the development of a winery on their property, so the City's consideration of changes to Calistoga's existing winery regulations is of great interest to the family. We hope that the Council will consider the following comments.

A Winery Definition Ordinance Does Not Regulate Wine Labeling

At the outset, it is important to note that the "Napa Valley" and "Calistoga" names are protected by State and Federal law thanks to the efforts of Congressman Mike Thompson and the Napa Valley Vintners. Wines labeled with the Calistoga or Napa Valley name must be primarily made of fruit from those recognized American Viticultural Areas ("AVAs"), and the Bounsall family strongly supports these labeling laws that benefit wineries and growers by promoting the unique wines from the Napa Valley and Calistoga AVAs. In contrast to labeling regulated exclusively by State and Federal law,[1] the Council is considering a zoning ordinance regulating land use similar to Napa County's Winery Definition Ordinance ("WDO"). As a zoning ordinance, the WDO's purpose is to protect agricultural lands, and its grape source requirement applies only in agricultural zoning districts.

A Blanket Grape Source Requirement Would Be Unconstitutional

The United States Constitution prohibits state and local governments from enacting laws that unduly burden interstate commerce.[2] The Napa County Counsel's Office

[1] Cities and counties are preempted from regulating the labeling of alcohol, which is reserved to Federal and State authorities. (California Constitution Art. 20 § 22.)

[2] The United States Constitution prohibits state and local governments from engaging in "economic protectionism" that would discriminate against goods imported from other areas. (*Pike v. Bruce Church, Inc.* (1970) 397 U.S. 197; *Philadelphia v. New Jersey* (1978) 437 U.S. 617; *Fort Gradiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources* (1992) 504 U.S. 353.) Discriminating against

recognized these limitations in 1990 and opined that the WDO's grape source requirement could be enacted for the purpose of agricultural preservation.[3] Accordingly, the WDO's grape source requirement applies only in agriculturally zoned lands,[4] and a blanket grape source requirement applying indiscriminately throughout Calistoga would not match the WDO or St. Helena's winery regulations.[5] Based on these constitutional concerns and the impact a grape source rule would have on the Bounsall family's planned winery,[6] the family opposes a grape source requirement that applies to industrially zoned lands.

Take a Measured Approach and Follow Napa County's Example

Calistoga understandably has looked to Napa County's WDO as an example, and the Council should take the same level of care in developing any new winery regulations. Napa County's WDO was adopted after numerous public meetings involving stakeholders and after completion of an Environmental Impact Report under CEQA, which studied the impacts of the WDO's changes to existing regulations. The Office of County Counsel also studied and advised the Board the legal implications of the WDO's provisions. Calistoga should take similar care to ensure an ordinance that promotes Calistoga's economy while protecting its agricultural lands and character. One question that should be answered is whether existing wineries would become legal nonconformities that cannot alter or expand operations.[7] If so, these wineries would lose nonconforming status if operations were suspended for 180 days or more.[8]

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goods from other areas, especially to protect local interests, also raises issues under the equal protection clause of the California Constitution (Art. 1, §7(a)) and the Sherman Anti-Trust Act (15 U.S.C. §1 *et seq.*).

[3] See attached memorandum from the Office of County Counsel to the Board of Supervisors dated October 16, 1989.

[4] The WDO's grape source requirement for agricultural lands is provided at Napa County Code §18.104.250. Examples of Napa County wineries approved after passage of the WDO in the County's industrial area and without grape source limits include Beringer Cellars (approved 12/19/01), Zapolski-Rudd Winery (approved 02/20/08), and Gateway Winery (approved 03/05/08).

[5] While St. Helena's small winery regulations require 85% of production to be from on-site grapes (Chapter 17.180), its Winery District zoning does not. (St. Helena Municipal Code Chapter 17.24). Similar to the WDO, St. Helena's small winery regulation is intended to "preserve agricultural land uses within the city of St. Helena." (St. Helena Municipal Code §17.180.010)

[6] The Bounsall family's planned winery is located on industrially zoned lands and will produce wines from the Napa Valley and Calistoga AVAs. In addition to these super premium wines, the family plans to make some lower priced "everyday" wines from grapes sourced in other counties. These everyday wines will be labeled in accordance with State and Federal law that prohibits the use of the Napa or Calistoga name on grapes sourced from other AVAs.

[7] Calistoga Municipal Code §17.44.010.

[8] Calistoga Municipal Code 17.44.020.

A Blanket Grape Source Requirement Is Bad Policy

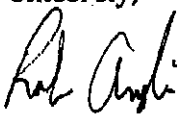
Napa's vintners and growers are among the most preeminent in the world, and many aspects of California's wine industry are centered in the Napa Valley. Napa Valley wineries make wines from other growing regions that are sold at lower price points or intended to reflect the characteristics of those non-Napa regions. In industrially zoned areas, it makes little sense to limit the resources available to these talented professionals, especially when unemployment is at 7.4% for Calistoga and 9.2% for Napa County as a whole.[9] Instead, the City should protect agricultural lands while allowing these winemakers to apply their talents to a wide range of grapes in industrial areas.

Stand-alone Tasting Rooms are not Wineries

Lastly, the concern regarding stand-alone tasting rooms in Calistoga has arisen in the context of a grape source ordinance. Because the Bounsall family plans to develop a fully producing winery rather than a stand-alone tasting room, we wish only to distinguish the two types of use. As noted in your Staff Report, stand-alone wine tasting rooms are branch premises of an established winery and are more akin to retail wine shops than agricultural processing facilities. Similarly, Napa County treats stand-alone tasting rooms as retail wine shops.[10]

Thank you for your careful consideration.

Sincerely,



Rob Anglin

cc: Richard Spitler, City Manager
Michele Kenyon, City Attorney
Ken McNabb, Planning and Building Manager
Bounsall family

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[9] Unemployment rates taken from the most recent figures release by the California Employment Development Department at http://www.labormarketinfo.edd.ca.gov/?pageid=1006.

[10] Two good examples of stand-alone tastings rooms in the County are the Flora Springs tasting room south of St. Helena and the Elizabeth Spencer tasting room in Rutherford. Both are in commercial zones and permitted as retail wine shops, not wineries.

INTER-OFFICE MEMO

DATE: October 16, 1989

TO: Board of Supervisors
FROM: Margaret L. Woodbury, Chief Deputy County Counsel
RE: Proposed Winery Definition Ordinance -- Legal Issues

Based upon a review of the proposed winery definition ordinance and research into the legal issues raised by its provisions, it is my opinion that the following portions of the proposed ordinance are most likely to stimulate legal challenge based upon federal or state constitutional or statutory issues. In this memorandum, the relevant text of each provision of concern is summarized, followed by a brief summation of the legal problems, and an assessment of the likelihood of successful legal challenge. Legal problems arising from environmental concerns are not addressed.

1. Unrestricted Retail Sales of Wine-Based Products of 14% or Greater Alcohol Content: §§12202(g)(5)(iii) and 12232(g)(5)(iii)

Summary of Provisions. These two subparagraphs (iii) would allow in the AP and AW zoning districts with a use permit the retail sale of brandy, port, sherry or other wine or wine-based product with an alcohol content of 14% or more produced by or for the winery irrespective of the place where the product is manufactured or the county of origin of the grapes from which the wine or wine-based product was made. By contrast, subparagraphs (i) and (ii) of these same provisions permit retail sales of wine with a use permit in these two zones only if the products soled are fermented, refermented or bottled at the winery or, if produced by or for the winery elsewhere, are made from grapes grown in Napa County.

Summary of Legal Issues.

a. U.S. Constitution, Article XIV, clause 2 ("No state shall...deny to any person within its jurisdiction the equal protection of the laws")

b. Calif. Constitution, Article 1, §7(a) (" A person may not be...denied equal protection of the laws...")

c. Calif. Constitution, Article 1, §7(b) ("A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens...")

Assessment of Likelihood of Successful Legal Challenge. The likelihood of successful legal challenge on all or a combination of the above grounds is high. Although the proposed regulation is merely an "economic" regulation as opposed to one affecting "fundamental rights", it can still withstand legal challenge on any of the above constitutional grounds only if its bears some rational relationship to a conceivable and legitimate state purpose [Hibernia Bank v. State Board of Equalization, (1st District, 1985) 166 Cal.App.3d 393; 62 Ops.Cal.Atty.Gen. 180 (1979)]. Since the County has adequate commercially-

(11)

zoned acreage where generic or non-locale specific winegrape products can be sold successfully, the sole justification for permitting retail sales of wine under (i) or (ii) on agriculturally-zoned land is the demonstrable marketing tie-in between premium wine products and the site, either specific or by appellation, of production of the source material. With the fall of generic wine prices in recent years and the continuing high price of County agricultural land it is becoming increasingly the case that premium winegrape production provides one of the few remaining economically-viable agricultural uses of the County's agriculturally-zoned land. This marketing advantage thus promotes continued use of agricultural lands within the County for agricultural purposes. Such promotion is legitimate since the preservation of agricultural land is a declared interest of the State of California (Williamson Act, Government Code §51220). However, this tie-in does not exist where the product is neither made locally nor utilizes local agricultural products, so there does not appear to be any rational relationship between (iii) and any legitimate state purpose.

2. Allowing Existing Wineries 18 Months to Establish by Use Permit Certain Uses to be Denied Immediately to all New Wineries: §§ 12202(i), 12232(k)

Summary of Provisions. These two provisions grandfather-in public tours, public promotional activities, winery guest picnic areas, and display and sale of wine-related items with the winery or appellation logo in AP and AW zoning districts if engaged in by existing wineries who established those uses either before the uses were prohibited or by obtaining authorization pursuant to use permit during a time when permitted by local ordinances. By doing so these provisions recognize the legal nonconforming status of these prior uses (although not calling it by that name) and confer upon that status protection from the usual "phase-out" rules of the County's present regulations pertaining to legal non-conforming uses. Granting such protection from involuntary loss of legal status is probably within the leeway which the courts permit local agencies when dealing with regulation of legal nonconforming uses.

The problem is with the second half of the first sentence of both provisions. This would give all existing wineries which have not heretofore legally engaged in these uses 18 months to request and be granted use permits for these uses, even though identical new wineries would not be entitled to request authorization for such uses. Since these uses would not exist at the time of adoption of the winery definition ordinance, they would never qualify as legal nonconforming uses.

Summary of Legal Issues.

a. See (a), (b), and (c), in (1), above.

b. Government Code section 65852 (all zoning regulations "shall be uniform for each class or kind of building or use of land throughout each zone...)

c. 15 USCA §2 (Sherman Anti-Trust Act): (It is a felony to

"monopolize, or attempt to monopolize or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several Statess or with foreign nations..")

Assessment of Likelihood of Successful Legal Challenge. The likelihood of successful legal challenge on the basis of the constitutional grounds set forth in (a), above, to this difference in the treatment of existing wineries who have not presently established on a legal basis any of these public accessory uses and new wineries which will not be permitted to engage in these uses is extremely high. While the courts grant counties and cities wide leeway as to existing uses due to constitutional constraints because immediate abolition of all or part of a viable non-nuisance businesses may give rise to claims of inverse condemnation under the federal and state constitutions, no such differential protection can be granted to uses established illegally or not yet established at all.

In addition, this provision may well be successfully challenged under (b), above, since state law does not permit local agencies to adopt discriminatory rules for the same types of future uses (wineries) on essentially similar properties within the same zoning districts.

While this provision certainly would promote monopolization of these public use activities by existing wineries as opposed to new wineries, successful challenge under §2 of the Sherman Anti-Trust Act is unlikely unless the County adopts this provision with statements such as "this is what the industry wants, we should not change what the industry wants, this is to protect existing businesses and discourage new businesses, etc.". This is because §2 requires a conspiracy between the regulating county and the regulated (and benefitted) industry which then results in monopolization of economic activities. Mere unilateral adoption by a governmental entity of a regulation which has monopolistic results within the regulated industry will not give rise to a §2 violation (Fisher v. Berkeley, 475 U.S. 260 (1986))

3. Restricting Winery Production Capacity Expansions to Projects Utilizing at least 75% Napa County-Grown Grapes: §§12419; 12423

Summary of Provisions. While the application of these two provisions to the various types of wineries is rather complicated, the basic idea (§12419) is that whenever an existing winery expands beyond its presently authorized or legally-established capacity or beyond its present "winery development area", the expansion capacity must obtain no less than 75% of its winegrape source material from grapes grown within Napa County. The winery development area is defined as 120% of the presently-developed area of an existing winery or 15 acres, whichever is greater (§12423).

Summary of Legal Issues.

a. (a), (b), and (c) of (1), above.

b. (b) and (c) of (2), above.

c. U.S. Constitution, Article 1, §8 ("The Congress shall Power...to

regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"--and, by implication, the states cannot do so unless expressly permitted by the Congress)

d. U.S. Constitution, Article 1, §10 ("No State shall...pass any... Law impairing the obligation of Contracts")

e. U.S. Constitution, Article 4, §2 ("The Citizens of each State shall be entitled to the Privileges and Immunities of Citizens in the several States.")

f. 15 USCA §1 (Sherman Anti-Trust Act ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restrain of trade or commerce among the several States, or with foreign nations is declared to be illegal...")

Assessment of Likelihood of Successful Legal Challenge. Despite the long list of issues raised by this proposal, it is actually the most likely of the three areas to withstand legal challenge, particularly if "winery development area" is limited to existing developed areas, eliminating the 20% unrestricted expansion area for existing wineries. Without this modification of §12423, the state law against non-uniform regulations within a given zone might support on its own a successful challenge to this provision.

The reason for this optimism is that there appears at least in concept to be a rational relationship between the 75% rule and the promotion of the preservation of Napa County agricultural land. This is because of such land is primarily used for premium winegrape production and that type of product is highly dependent both for actual quality and consumer acceptance upon its identification with the geographically-unique production areas of its source material. This rational relationship may be sufficient to overcome the equal protection arguments and, combined with the rather minimal effect on interstate commerce (there is by nature of the product very little interstate importation of grapes for this premium market), may overcome the privileges and immunities arguments since the latter comes into play only when local regulations will have a profound effect on interstate harmony [72 Ops.Cal.Atty.Gen. 86 (1989)].

This minimal effect and the inherent geographic identification of the County's premium product may also overcome arguments based upon the Commerce Clause, especially since the federal and state governments have already recognized the special area-specific nature of these products through their various appellation regulations. A good discussion of this is contained in a legal opinion in the possession of our office which was prepared by the legal firm of Townsend & Townsend.

Section 1 of the Sherman Anti-Trust Act applies to local agencies only if the activities regulated are not ones in which the relevant State has expressed an interest in state or local control (Community Communications Company v. City of Boulder 455 U.S.40 (1982) and the many subsequent cases which expanded on the state action concept). However, in this instance, the proposed rule promotes in a rational way the preservation of agricultural

lands, a purpose which the Legislature of the State of California has declared to be of paramount importance in the preface to the Williamson Act and the state planning agency has found to be of such importance in the CEQA Guidelines, that it has listed (Appendix G, §y) impairment of agricultural lands as a significant adverse environmental impact which must be considered whenever a local agency is considering approval of a discretionary permit. For this reason, challenge to this provision based solely on §2 is unlikely to be successful.

As discussed above, because this provision may have some mildly monopolistic effects in favor of existing wineries, §2 of the Sherman Anti-Trust Act may be a problem, but only if the 20% expansion area is not deleted and that action is explained with the sort of statements indicative of county-industry collusion described in (2), above. Without this provision, the rule would apply evenly to all owners within the zone except those grandfathered-in as to existing legal capacity for independent constitutional reasons (to avoid inverse condemnation) and it is unlikely that anyone could, under these circumstances, show either a significant monopolistic effect or intent to create such an effect on either a local or interstate basis.

Finally, the constitutional prohibition against the local adoption of laws or regulations which impair existing contracts should not by itself support a successful legal challenge. While it is common in the industry for wineries to enter into long-term contracts with growers for grapes, it is unlikely that a court would feel particularly sympathetic towards persons who entered into purely speculative contracts to buy grapes in future years for production capacity for which they had not obtained discretionary approval at the time of execution of the contracts. Since the proposed ordinance grandfathers-in all legally-authorized or legally-established capacity, the 75% rule would not impair any long-term contracts supplying only that capacity.